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DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

CVS PHARMACY #1360
Respondent.

Case No.: DH-I-07-D100288

AMENDED FINAL ORDER¹

I. INTRODUCTION

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Code, 2001 Ed. §§ 2-1801.01 *et seq.*) and D.C. Code, 2001 Ed. §§ 48-801.03,² 47-2885.10(a)(3)³ and

¹ This Amended Final Order corrects my July 7, 2008, Final Order by amending my conclusion on the third violation (Respondent's failure to clean the pharmacy floor and carpet, in violation of 22 DCMR 1908.2 and 1908.4), as well as the associated civil fine.

² D.C. Code, 2001 Ed. § 48-801.03 reads in pertinent part:

each pharmacy shall legibly post on the poster its current selling prices for the 100 most commonly used prescription drugs, the professional and convenience services it offers and the additional charges therefor, and the eligibility and terms of any discount it offers on prescription drugs. The completed poster shall be displayed prominently in the immediate vicinity of the prescription drug service area in such a manner as to be easily visible to consumers without having to obtain permission or assistance of an employee of the pharmacy.

³ D.C. Code, 2001 Ed. § 47-2885.10(a)(3) reads in pertinent part:

The Mayor may refuse the issuance or renewal, or may revoke, or may suspend for not more than 90 days, a license issued pursuant to this part for:

(3) Selling, or offering for sale, adulterated or misbranded drugs or devices.

47-2885.13(a);⁴ 22 District of Columbia Municipal Regulations (“DCMR”) 1306.3;⁵ 22 DCMR 1503.1;⁶ 22 DCMR 1907.4;⁷ 22 DCMR 1908.2 AND 1908.4;⁸ and 22 DCMR 1901.6 (this provision was listed in the NOI as 22 DCMR 1909.6; however, the regulations were recodified in January 2008 and 1901.6 is the current citation).⁹ By Notice of Infraction D100288, served on October 25, 2007, the Government charged Respondent, CVS Pharmacy #1360, with violating

⁴ D.C. Code, 2001 Ed. §§ 47-2885.13(a) reads in full:

Drugs which may deteriorate shall at all times be stored under conditions specified on the label of the original container and in accordance with applicable District of Columbia or federal laws or regulations, and shall not be sold or dispensed after the expiration date designated on the label of the original container, and in accordance with applicable District of Columbia or federal laws or regulations.

⁵ 22 DCMR 1306.3 reads in full:

A prescription for a controlled substance listed in Schedule II shall not be refilled and shall be cancelled out by a line drawn through the entire prescription order, with the date dispensed and initials of the person that dispensed the drug.

⁶ 22 DCMR 1503.1 reads in full:

Accountability audits in pharmacies shall be accomplished through a review of invoices, prescription file, other records required by federal and District of Columbia laws and regulations, and this chapter.

⁷ 22 DCMR 1907.4 reads in pertinent part:

(i) Have refrigeration facilities exclusively for the storage of drugs requiring cold storage with a thermometer controlling the interior temperature to keep it maintained between thirty-six degrees Fahrenheit (36° F) and forty-six degrees Fahrenheit (46° F).

⁸ 22 DCMR 1908 reads in pertinent part:

(2) A pharmacy and all areas under the control of the pharmacy, including storage areas and restrooms, shall be maintained in a clean and sanitary condition free of infestation by rodents, birds, insects, and other vermin.

(4) All pharmacy equipment shall be kept clean and in good operating condition.

⁹ 22 DCMR 1901.6 reads in full:

Drugs and medical devices with expired dating, or that are otherwise misbranded or adulterated, shall not be stored with currently dated products or those that are safe for their intended purposes, but shall be separated from active stock and so identified.

these provisions of the governing regulatory scheme by failing to post information regarding the 100 most prescribed drugs, failing to draw a line through a prescription for a controlled substance that had been filled, failing to clean the pharmacy floor and rug, failing to use a thermometer-controlled refrigerator, and mislabeling medicines that were prepared by the pharmacist for individual sale but then returned to stock (a “Return to Stock” violation (D.C. Code, 2001 Ed. §47-2885.10(a)(3))). The Government alleged that the violations occurred on October 16, 2007, at 2646 Naylor Rd., SE and sought \$8,500 in fines. Respondent filed a denial on December 6, 2007, but on April 21, 2008, amended its plea to Admit with Explanation and sought a reduction in the proposed fines.

On June 13, 2008, I consolidated this matter with nine other Notices of Infraction (“NOI”). OAH Rule 2919. However, I also separated non-“Return to Stock” violations for resolution in separate Final Orders. OAH Rule 2919.3. During a hearing on a different NOI issued to this Respondent, I granted the parties’ request to stay this matter so they could attempt to settle this NOI and the nine others. They were unsuccessful and both parties have consented to this matter being resolved on the documents that were filed with the NOI and Respondent’s pleas. Based on these documents and the entire record herein, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. On October 16, 2007, a Government Pharmacy Inspector inspected Respondent’s store number 1360, located at 2646 Naylor Rd., SE. During the investigation, the Inspector discovered that Respondent had failed to: a) hang a poster containing information regarding the 100 most commonly used drugs; b) draw a line through a prescription for a controlled substance

that had been filled; c) clean the pharmacy floor of trash and pharmacy rug, which was heavily stained; and d) use a thermometer-controlled refrigerator to store prescription medications.

2. Respondent had failed to hang a poster containing information regarding the 100 most commonly used drugs, but did so once it was brought to the pharmacist's attention that the poster was missing. This poster is hung in the customer area and is frequently torn down. Respondent eventually draws a line through prescriptions for controlled substances that have been filled, but, depending on workloads, does so only after the customer has taken the filled prescription and left the store. Prior to issuance of the NOI, Respondent had allowed trash to accumulate on the pharmacy floor and the carpet to become heavily stained. After receipt of the NOI, Respondent cleaned the pharmacy area and replaced the carpet in the pharmacy area. Respondent did use a refrigerator that may have kept medication within the manufacturer's requirements, but it was not thermometer controlled. The refrigerator has been replaced with one that is thermometer controlled.

III. DISCUSSION AND CONCLUSIONS OF LAW

The Government alleged that Respondent violated D.C. Code, 2001 Ed. §§ 48-801.03 and 47-2885.13(a); 22 DCMR 1306.3; 22 DCMR 1503.1; 22 DCMR 1907.4(i); 22 DCMR 1908.2 and 1908.4; and 22 DCMR 1901.6 by failing to post information concerning the 100 most commonly used prescription drugs, failing to draw a line through a prescription for a controlled substance that has been filled, failing to clean the pharmacy floor and rug, and failing to use a thermometer-controlled refrigerator. Respondent admits the violations as alleged in the NOI.

A violation of D.C. Code, 2001 Ed. § 48-801.03 (failure to post information concerning the 100 most commonly used prescription drugs) is a Class 3 infraction punishable by a \$500

fine for a first offense. 16 DCMR 3201.1(c); 16 DCMR 3615.4(f). Respondent argued for a \$300 fine for this violation, as the poster is frequently torn down and was replaced immediately once the Inspector noted the problem. A violation of 22 DMCR 1503 (failure to draw a line through a prescription for a controlled substance that has been filled) is a Class 1 infraction punishable by a \$2,000 fine for a first offense. 16 DCMR 3201.1(a); 16 DCMR 3616.1(h). Respondent argued for a \$1,000 fine for this violation, as its pharmacists eventually cross out all prescriptions before the sale is recorded in the pharmacy's "Controlled Substance Inventory" and other pharmacy records. A violation of 22 DCMR 1908.2 and 1908.4 (failure to clean the medication shelves and pharmacy compounding area) is a Class 2 infraction punishable by a \$1,000 fine for a first offense. 16 DCMR 3201.1(b); 16 DCMR 3615.2(v). Respondent argued that a \$300 fine is appropriate, because even though the pharmacy carpet was stained, it was not "unsanitary," and a new carpet was installed in the pharmacy (Respondent did not address the fact that trash had been allowed to accumulate on the floor in the pharmacy area). A violation of D.C. Code, 2001 Ed. §47-2885.13(a) (failure to use a thermometer-controlled refrigerator) is a Class 1 infraction punishable by a \$2,000 fine for a first offense. 16 DCMR 3201.1(a); 16 DCMR 3615.1(o). Respondent argued for a \$200 fine for the violation, because it has replaced the refrigerator.

I conclude that Respondent's acceptance of responsibility and corrective action taken concerning the failure to post information regarding the 100 most prescribed drugs are mitigating circumstances which warrant a reduction in the total fines. However, I conclude there are no mitigating circumstances concerning Respondent's failure to draw a line through a filled prescription, allowing trash on the pharmacy floor and the carpet to be heavily stained, and to have the mandated refrigerator in place. I impose a \$4,300 fine.

IV. ORDER

Therefore, based on the entire record herein, it is this 8th day of July 2008

ORDERED that Respondent CVS Store #1360 is **LIABLE** for violating D.C. Code, 2001 Ed. §§ 48-801.03 and 47-2885.13(a); 22 DCMR 1306.3; 22 DCMR 1503.1; 22 DCMR 1907.4(i) as charged in Notice of Infraction No. D100288; it is further

ORDERED that Respondent shall pay a fine in the amount of **FOUR THOUSAND THREE HUNDRED DOLLARS (\$4,300)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (15 calendar days plus 5 days for service by mail pursuant, to D.C. Code, 2001 Ed. §§ 2-1802.04 and 2-1802.05); it is further

ORDERED that, if Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, by law, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i)(1); it is further

ORDERED that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(f), the placement of a lien on real or personal property owned by Respondent, pursuant to D.C. Code, 2001 Ed. § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Code, 2001 Ed. § 2-1801.03(b)(7); it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

July 8, 2008

 /SS/
Jesse P. Goode
Administrative Law Judge